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Supreme Court of the United States

October Term 1968

No. 884

ALFRED M. SHAFTER, as next friend of the dependents and next of kin of JOAQUIN FARINA MUNIZ, and for such other persons as may be similarly situated, such as dependents and next of kin of GEORG JOSEPH KOSTKA, GERHART RUDI RICHARD KLATT, DIETER AHRENS, KOCH LOTHAR LUDWIG WILMES, and GUNTHER SCHIKULLA, and KARL-HEINZ WEINHOLD,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent,

and

ALFRED M. SHAFTER, as next friend of the defendants, etc., et al.,

Third-Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

JACOB RASSNER,
Attorney for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on October 1, 1968.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 273 F. Supp. 152 (1967). The opinion of the United States Court of Appeals for the Second Circuit, entered October 1, 1968, is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. What was the intent of the framers of NATO-Status of Forces Agreement of June 19, 1951 (4 U.S.T. 1792) as affecting rights of third-party claimants to recover damages in or have access to United States Federal Courts for personal injuries and death resulting from maritime torts committed by a United States public vessel in German waters, and in place thereof substituting a German administrative tribunal as the exclusive forum?

2. Was it the intent of the framers of the NATO-Status of Forces Agreement of June 19, 1951 (4 U.S.T. 1792) to depart from the well-established concept of uniformity of Admiralty Law so as to authorize property damage claimants access to our Admiralty courts and to deny such access to personal injury and death claimants predicated on the same collision?

3. Was it the intent of the framers of the NATO-Status of Forces Agreement of June 19, 1951, entered into force with Germany July 1, 1963 (TIAS-5351), to nullify and revoke the rights of access to our Courts "in all degrees of jurisdiction", and fair, equitable and national treatment, as granted to German nationals by the 1954 Treaty of Friendship, Commerce and Navigation (7 UST 1839; TIAS 3953) entered into force with Germany July 14, 1956?

4. What is the interpretation, force and effect of the provisions of Article III, Section 2 of the Federal Constitution as to the exclusive authority and power of our Federal Judiciary to adjudicate maritime tort claims against

the United States, and to what extent, if any, is such exclusive authority and power subject to repeal, modification or substitution by treaty? Did the Court below correctly express the intent of the framers or erroneously introduce a concept of exclusive jurisdiction by a foreign tribunal not contemplated by said framers or encompassed within the Treaty?

Statement

The Petitioners instituted their action on the authority of the Public Vessels Act and the Suits in Admiralty Act on November 16, 1965.

The subject matter in suit treats with damages for wrongful death and personal injuries arising from a collision between the USNS BLUE JACKET, a merchant vessel of the United States and a German coastal freighter, the M/V DIRK, on February 10, 1964, on the Weser River in German territorial waters.

At the time of the collision, the BLUE JACKET was not equipped for war activities, was not involved with NATO defense maneuvers or exercises and was not carrying guns or ammunition. The BLUE JACKET was not assigned, transferred, or being operated under or by the NATO command; but, on the contrary, was at all times under the management, operation and control of the Military Sea Transport Service agency of the Respondent.

On November 3, 1965, the Defense Costs Office in Bremen, an administrative agency of the Federal Republic of Germany, after assuming jurisdiction over claims for compensation of the next of kin of the deceased seaman and the Master, as well as of the surviving crew member, dismissed all of these claims with prejudice.

The District Court Judge, Hon. Marvin E. Frankel, rejected jurisdiction over the personal injury and death

claims of the Petitioners and dismissed the complaint on July 26, 1967, on Respondent's contention that the Petitioners' rights were exclusively governed by Article VIII, Par. (5) (h) of the North Atlantic Treaty Status of Forces Agreement ("NATO-SOFA") of June 19, 1951, 4 U.S.T. 1792; and, that the remedies provided under the Public Vessels Act were not available to Petitioners and were deemed substituted by the remedial apparatus of the NATO-SOFA Agreement.

The dismissal was based on the provisions of Article VIII Par. (5) (h) of the NATO-SOFA Agreement which reads as follows:

> "Except in so far as sub-paragraph (e) of this paragraph applies to claims covered by paragraph 2 of this Article, the provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading, caarriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply."

The wrongful death actions predicated on the loss of life of the Master and five crewmen, and for the personal injuries of the surviving seaman were dismissed. However, jurisdiction was retained over the causes of action by the administrator of the Master's estate and the British, Danish and German underwriters based on the loss of the M/S/ DIRK and property damages (U.S.D.C., S.D.N.Y., 66 Ad. 132); and, there is still pending a libel for damages to the USNS BLUE JACKET, which was filed by the Respondent United States against the Petitioner, the administrator of the Master's estate as well as against the Danish, British and German underwriters as co-defendants (U.S.D.C., S.D.N.Y., 66 Ad. 477).

The Court below adopted as conclusive the decisions by the claims authorities in Germany that the Petitioners' claims were governed and barred by the administrative

plan or scheme as provided by Article VIII of the NATO-SOFA Agreement; and, held that Article VIII *pro tanto* constituted a revocation and substitution of a German tribunal for the exclusive authority granted by Congress to our Federal Judiciary under our Constitution.

There was no finding by the claims authorities in Germany respecting Petitioners' rights under the Public Vessels or Suits in Admiralty Acts, but it was decided that the Petitioners' claims were cognizable under the NATO-SOFA Agreement, and maintainable in Germany exclusively. There was no hearing on the merits.

The United States Circuit Court of Appeals for the Second Circuit affirmed the summary judgment of the District Court on November 6, 1968 (docketed November 8, 1968), but without opinion.

Reasons for Granting the Writ

1. The Court below has promulgated a concept of law which is in violation of the provisions of Article III, Section 2 of the United States Constitution, in that the exclusive Admiralty jurisdiction, reserved to our Federal Judiciary, has been erroneously delegated to a foreign administrative tribunal.

2. The Court below has promulgated a concept of law which is in violation of the provisions of Article III, Section 1 of the United States Constitution in that the exclusive authority of Congress over the jurisdiction of our Federal Courts has been erroneously circumvented.

3. The Court below has promulgated a concept of law which constitutes not only a radical departure from our American concept of fundamental justice, which guarantees to litigants a trial on the merits, but it has also erroneously interpreted the provisions of Article VIII of the NATO-

SOFA Status of Forces Agreement of June 19, 1951 (4 UST 1792) in a manner which has the effect of enacting maritime laws by treaty, a sphere which, by Article I, Sec. 8 of our Constitution has been reserved exclusively to the Congress of the United States.

4. Petitioners have been denied access to our Courts, and fair, equitable and national treatment in violation of the Treaty of Friendship, Commerce and Navigation (7 UST 1839, TIAS 3593) entered into force with the Federal Republic of Germany on July 14, 1956. The 1954 Treaty of Friendship, Commerce and Navigation has been violated and the Petitioners have been deprived of rights guaranteed to them thereunder in addition to their rights under our United States Constitution.

5. The Court below has erroneously interpreted the provisions of Article VIII of the NATO-SOFA Status of Forces Agreement of June 19, 1951 (4 UST 1792) as nullifying the remedial benefits granted pursuant to the Suits in Admiralty and Public Vessels Acts whereas there exists no word, intent, or legal authority therefor.

6. This matter brings into focus the serious question concerning the rights of foreign nationals in all countries where NATO operates to establish and determine to what extent, if any, remedial benefits available to American citizens, pursuant to the provisions of the Public Vessels Act, are available to an alien injured by a United States vessel in foreign countries.

7. It is fair and reasonable to conclude from the travaux préparatoires of NATO-SOFA that the framers thereof never intended to include private maritime claims within the purview of the NATO-SOFA Agreement of June 19, 1951. Nor did said Agreement contain any words of reference regarding the exclusive jurisdiction by any receiving signatory state over such maritime claims to the exclusion of the courts of the sending state.

8. The dismissal of the claims of the Petitioners, on the basis of the Lower Court's interpretation of the NATO-SOFA Status of Forces Agreement, sets a precedent for and results in an amendment of the Constitution unauthorized by Article V thereof.

9. An interpretation of NATO-SOFA which substitutes for the exclusive jurisdiction of our Federal Courts over claims in Admiralty reserved by our Constitution to Congress raises a vital question respecting rights of Petitioners herein and of all other maritime claimants, which merits consideration and adjudication by this Honorable Court, and a petition for granting a writ of certiorari appears to be justified.

POINT I

The decision by the Court below is in conflict with and violation of provisions of Article I Section 1 and Article III Section 1 of the Federal Constitution.

Jurisdiction of the Federal Court was erroneously declined as there exists no authority, save the Congress of the United States to ordain the jurisdiction of Federal Courts, other than the Supreme Court.

Fitzsimmons v. *Yeager,* 391 F. 2d 849 (1968).

The legislative power reserved to the Congress by our Constitution cannot be usurped by means of a treaty provision as was done in the instant case on the authority of NATO-Status of Forces Agreement, Article VIII.

The Public Vessels and Suits in Admiralty Acts came into being by Acts of Congress based on its exclusive legislative powers, as provided by Article I, Section 1 of the Constitution of the United States.

The erroneous interpretation by the Court below of Article VIII of NATO-SOFA establishes a concept whereby legislation which is exclusively reserved to Congress is accomplished by Treaty contrary to our Constitution.

The exclusive power of Congress would be usurped through the medium of the NATO-SOFA Agreement. Such procedure has been condemned by our Courts as clearly stated in the case of *American Dredging Co.* v. *Local 25, Marine Div., Int. U. Op. Eng.*, 338 F. 2d 837 (1964), at page 850:

> "The Constitution of the United States has reserved to the Congress the power to legislate. Article I, section 1 provides that 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'.
>
> Not even the Supreme Court of the United States can usurp the legislative power reserved to the Congress by the Constitution. The Supreme Court itself has time and again paid homage to the doctrine of the separation of powers decreed by the Constitution and declared that judicial legislation is abhorrent to, and in violation of the Constitutional scheme."

Our Federal Courts derive their jurisdiction wholly from the authority of Congress under Article III Section 1 of the Constitution. The Public Vessels and Suits in Admiralty Acts are based upon said authority.

Authority for ordaining a foreign claims tribunal with jurisdiction over claims arising out of a collision caused by a United States vessel is completely lacking.

Any provision which purports to confer such jurisdiction without an act of Congress is completely void.

The following quotation appears in the case of *Fitzsimmons* v. *Yeager, supra,* at page 859:

> "Independent of this consideration, is the further critical inescapable fact that the Congress of the United States, and it alone, can ordain the jurisdiction of federal courts, other than the Supreme Court of the United States.
>
> All federal courts, other than the Supreme Court, are established by Congress under Section 1 of Article III of the Constitution. They derive their jurisdiction wholly from the authority of Congress as explicitly expressed in legislative enactment and Congress may restrict conferred jurisdiction at its discretion. Kline v. Burke Construction Co., 260 U.S. 226, 233-234, 43 S.Ct. 79, 67 L.Ed. 226 (1922), and the cases therein cited."

The rights having come into existence through legislation by Congress, common sense and basic justice is violated by any attempt to nullify such rights through any other means than by comparable and appropriate act of Congress.

Fitzsimmons v. Yeager, supra.

Our Admiralty Courts having been vested with jurisdiction in an action predicated upon a collision caused by a United States vessel, any shifting of jurisdiction or change in the remedial provisions of the Public Vessels Act, without an Act of Congress, is illegal and therefore void.

This has been clearly expressed in the case of *American Dredging Co.* v. *Local 25, Marine Div., Int. U. Op. Eng., supra,* at page 850:

> ***"The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters."***

POINT II

The NATO-Status of Forces Agreement of 1951 has been erroneously construed and interpreted by the Court below that the said agreement vested exclusive jurisdiction in German authorities over claims against the United States for personal injury and death involving the merchant vessel USNS Blue Jacket.

The Travaux Préparatoires of the NATO-SOFA Agreement, Article VIII (5) (h) thereof and the drafts and records of deliberations by its framers establish that their purpose and intent was to preserve the rights of private third parties in maritime clain without exception.

A careful study of the legislative history of the Treaty in a volume entitled INTERNATIONAL LAW STUDIES—NATO AGREEMENTS ON STATUS: TRAVAUX PRÉPARATOIRES, edited and annotated by Professor Joseph M. Snee, S.J., Professor of Law, Georgetown University Law Center,* supports and confirms the view that the maritime claims of private third parties were not within the contemplation of the Treaty.

The Status of Forces Agreement with which we are concerned was the first of three NATO agreements on Status and the only one that we are concerned with herein. On January 23, 1951 (D-D 151) 23 p. 345, the United States submitted the first draft of the agreement which was based on the earlier agreement relative to the status of members of the armed forces of the Brussels Treaty Powers and which had previously been agreed to by five of the twelve NATO countries, Belgium, France, Luxembourg, the Netherlands and the United Kingdom (p. 311).

The draft submitted by the United States did not repeat or include Article VIII par. 2(a) of the Brussels Treaty (p. 336) which reads as follows:

"2. The provisions of this Article do not apply to:

(a) Maritime salvage claims against a vessel used in connection with the Brussels Treaty or claims

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* Page references are to Snee's text.

> against such a vessel for damage caused by colsion. These claims will be brought against the authorities of the Party to whom the vessel belongs".

On February 15, 1951: (MS (J)—R (51) 3, p. 95, the juridicial sub-committee met and considered Article VII, par. 1 (p. 349) of the draft submitted by the United States with relation to maritime claims as agreed to in the last sentence of paragraph 2 (a) of the Brussels Treaty, *supra*, p. 336 as follows:

> "These claims will be brought against the authorities of the Party to whom the vessel belongs."

The committee that composed and framed the sentence had recognized that the question as to which courts would have jurisdiction was without the scope of the agreement and that the question of jurisdiction was within the province or contemplation of the conventions then in existence, including the provisions of the International Convention at Brussels of April, 1926.

Claims in respect to maritime damages were specifically excluded from Article VIII of the Western Union Agreement. (Brussels Treaty, p. 336); to which the last sentence of Article VIII, par. 2 (a) above quoted referred. Furthermore, in the present text proposal by the United States, Mr. G. W. Lambert, of the United Kingdom, Chairman of the juridical sub-committee, proposed that the word "claimant" should be deleted from Article VII, par. 4 (a) (predecessor to the final draft of Article VIII, par. 5 (h)), since it was irregular and restricted the rights of claimants, and the deletion of the words "the claimant" resulted in confining the claims procedure to the claims for damages as between the contracting parties and individual members of their forces (p. 97).

Therefore it is clear from the foregoing that the rights of private individuals as to their choice of forum was always intended to be preserved.

It was agreed to amend Article VII to make it applicable only t state vessels; and, also, to specify the definition of "State vessel".

The Chairman proposed to prepare a redraft of this Article in the light of the changes and comments had thereon pertaining to maritime damages.

All through the negotiating history of the aforesaid paragraphs of Article VIII of the Status of Forces Agreement, and incorporated in every draft proposal thereof, prior to the final agreement, the clear intent of the framers respecting the rights of the claimants herein is plainly set forth in the following paragraph:

> "The provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading carriage, or discharge of a cargo."

DMS-D (51) 11 R, p. 401; MS-D (51) 11 (2R), p. 416; D-D (51) 57, p. 438.

On April 9, 1951, the United States draft proposal MS-D (51) 20, page 464, was submitted with the following reference to amend Article VIII, pp. 466, 467:

"17. Strike the second subparagraph of paragraph 4(f), and add to paragraph 4 the following provisions:

> (g) Each Contracting Party will assume, process, and pay all claims of its nationals, including vessels flying its flag, for damages arising out of any maritime incident, including damage by vessels to land structures, caused by the public vessels of any other Contracting Party, wherever such claims for damages may arise.

The assumption of claims, arising out of any maritime incident, shall apply and be paramount in any situation where any vessels involved shall be engaged in any activity connected with or arising out of the operation of the North Atlantic Treaty, including situations where the other vessel or damaged property is not being utilized in connection with the North Atlantic Treaty.

The representations of any Contracting Party involved, as to what vessels are its public vessels and whether they are engaged in any activity arising out of the North Atlantic Treaty, shall be conclusive.

The cost incurred in the assumption of claims involving maritime incidents shall be distributed between the Contracting Parties in the same manner as is specified for the distribution of assumed claims under paragraph 4 of this Article. The State of which the claimant is a national shall be considered the "receiving State."

The nationals of a "receiving State" shall, in any maritime incident where the receiving State is obligated by this Agreement to assume and process the claim arising out of the maritime incident, have no right of action in the courts of any other Contracting Party arising out of such incident."

On April 20, 1951 (MS-R (51) 11 p. 152) the committee headed by Mr. W. V. J. Evans of the United Kingdom met to discuss among other things, the aforesaid United States proposal to amend Article VIII.

The United States Representative explained that his Government felt that it would be desirable to attempt to lay down some kind of procedure to cover maritime claims made by third parties. Objections to the United States proposal were voiced by all the representatives of the various NATO countries, including Chairman Evans, representing the United Kingdom; and, "it was finally pointed out

that the proposal by the United States was in conflict with international law and international agreements, and for that reason alone could not be accepted". (p. 154)

The United Kingdom amendment as proposed was accepted as contained in (MS-D (51) 22, p. 472 par. 9), where, for the first time, the words of Article VIII(5)(h) in question herein, were first incorporated, and appear as follows:

> "9. It is suggested that the second sentence of paragraph 4(f) should become subparagraph (g) with the addition, after the words 'discharge of cargo', of the words 'other than claims for death or personal injury to which paragraph 4 above does not apply".

The views of Chairman Evans were as follows:

> "10. The Chairman said that in his view the procedure proposed in the additional paragraph was impracticable. For example, if a passenger vessel, carrying several hundred passengers belonging to say twenty or thirty nations, was sunk by a NATO vessel as a result of collision, the application of the paragraph would mean innumerable actions for damages being taken in all the various countries concerned, in accordance with their own particular laws. The members of the Shipping Company, for instance, could not possibly be represented at all these actions".

Clearly, it was the intent and purpose of the framers, by the rejection of the United States draft proposal, to preserve the fundamental right of a claimant to his choice of forum in the courts of the authorities of the party to whom the offending vessel belonged.

Mr. Evans, Chairman of the working group, stated (p. 211, par. 29), that two parties to a multilateral agreement were free to conclude a bilateral agreement, on condition that the latter did not prejudice the interests of third parties.

On May 29, 1951 (MS-R (51) 19, p. 211), the working group considered draft D-D (51) 127 of May 7, 1951, p. 533, and took up the further questions raised, at which time the United States representative inquired as to the first clause of sub-paragraph 5 (h), which was to have been deleted and asked why it had been retained.

The Chairman on p. 213, par. 14, explained that paragraph 2 of Article VIII applied to cases, among others, of damage arising out of the use of a ship or the loading or discharge of a cargo. Damage caused in such circumstances to goods which were the property of a contracting party was covered by this paragraph. Damage caused in the same circumstances to the property of third parties, other than the contracting parties, were not covered by paragraph 5 of Article VIII.

On May 30, 1951, MS-R (51), 20, p. 215, the working group in committee again considered the draft agreement D-D (51) 127 of May 7, 1951 and, with regard to Article VIII, par. 4, 5 and 5(h) concluded the following (p. 215):

> "Summary Record of a Meeting of the Working Group of Status, 30 May 1951
>
> I. Consideration of Draft Agreement.
>
> 1. The Italian Representative stated that his Government withdrew the proposed amendment to Article VIII, paragraph 5.
>
> Article VIII, par., 5(h)
>
> 2. In reply to a question put by the United States Representative, the Chairman explained that it was clear that paragraph 4 applied to claims of Contracting Parties and paragraph 5 to claims of individuals. The last clause of paragraph 5 (h), which reads as follows: 'other than claims for death or personal injury to which paragraph 4 of this Article does not apply', was therefore not strictly necessary. It had seemed advisable, however, to retain this clause in order to avoid any possible ambiguity' (pp. 215, 216)."

The said clause was retained by the framers of the agreement in order to avoid any possible ambiguity as to the nature of the claims; whether said claims constituted claims by the contracting parties and/or by individual members of their forces; and, therefore, had nothing to do with maritime claims of private persons or claims by third parties. The comments by the Chairman that the last clause of said paragraph, "was therefore not strictly necessary", substantiates the position of the petitioners; for, if the clause is omitted from consideration it will be clear that the private maritime claims and rights of the claimants herein fall outside the purview of the NATO-SOFA Agreement and are rightly within the jurisdiction of the District Courts of the United States.

The clearly expressed and unmistakable intent of the framers of the agreement as shown in their debates and deliberations was to preserve all existing rights of private persons, and not a single word can be found which would justify the belief that there ever was any consideration given or intent expressed by them that any of the existing laws or provisions of the remedial statutes here involved be affected and/or claimants' rights thereunder be abridged.

Article VIII of the NATO-SOFA Agreement was an administrative procedure supplementing the Treaty only for the settlement of claims, which included the torts, of members of our armed forces stationed in Germany.

All maritime claims of private third parties were completely excluded and did not come within the scope or purview of the NATO/SOFA Agreement.

In an official Department of the Army pamphlet interpreting Article VIII(5)(h) of NATO-SOFA, the following excerpt appears:

> "Contractual claims of third parties are not cognizable under Article VIII, and neither are third-party claims of a maritime nature."
>
> Department of the Army Pamphlet 27-162: "Claims", January, 1968, p. 96.

The intent and purpose of the framers of Article VIII, (5) (h), *supra*, was clearly expressed, confined to and entirely based upon the self-same reservations as contained in Article VIII (par. 2a) of the aforesaid Brussels Treaty Powers agreement, as quoted *supra*, (p. 336), respecting the rights of all maritime claimants without exception, and nothing in the record of the deliberations of the framers and/or the draft proposals involved therein can be pointed to or exists to the contrary, whereas the record is replete with objection to and rejection by the representatives of all the NATO countries of any encroachment upon or restriction of the maritime rights of all private third party claimants as specifically reserved by the said Brussels Treaty Powers Agreement.

There is therefore, no legal barrier to the Petitioners herein pursuing their legitimate claims under the legal remedies as provided by the Public Vessels Act, particularly in view of the fact that their initial claims have been rejected by German administrative authorities with prejudice, and their fundamental rights to a competent judicial determination of their claims have been foreclosed.

As was held in *Lockerty* v. *Phillips*, 319 U.S. 182, 188; 63 S. Ct. 1019, 1023, 87 L. Ed. 1339:

> "[a] Construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."

In the case of *United States* v. *Robel*, 88 S. Ct. 419 (1967) p. 431, this Honorable Court first held:

> "The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed. Cantwell v. State of Connecticut, supra, 310 U.S., at 304, 60 S.Ct., at 903. Before we can decide whether it is an undue infringement of protected rights to send a person to prison for holding employment at

> a certain type facility, it ought at least to appear that Congress authorized the proscription as warranted and necessary. Such congressional determinations will not be assumed. 'They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized * * * but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.' Greene v. McElroy, supra, 360 U.S., at 507, 79 S.Ct., at 1419."

Secondly, in *Watkins* v. *United States*, 354 U.S. 178, 205; 77 S. Ct. 1173, 1188, 1 L. Ed. 2d 1273, this Honorable Court held:

> "*Second.* We said in Watkins 1. United States, 354 U.S. 178, 205, 77 S.Ct. 1173, 1188, 1 L.Ed.2d 1273, that Congress must take steps to assure 'respect for constitutional liberties' by preventing the existence of a 'wide gulf between the responsibility for the use of * * * power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460; Marcus v. Search Warrants of Property, etc., 367 U.S. 717, 730, 81 S.Ct. 1708, 1715, 6 L.Ed.2d 1127; A Quantity of Copies of Books v. State of Kansas, 378 U.S. 205, 213, 84 S.Ct. 1723, 1727, 12 L.Ed.2d 809 even when Congress acts pursuant to its 'great powers,' Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164, 83 S.Ct. 554, 565, 9 L.Ed.2d 644. Without procedural safeguards, regulatory schemes will tend through their indiscriminate application to inhibit the activity involved. See Marcus v. Search Warrants of Properties, etc., supra, 367 U.S., at 734-735, 81 S. Ct., at 1717-1718."

Our Supreme Court has consistently held that when the meaning of a treaty provision is ambiguous or uncertain, recourse may be had to the negotiations and diplomatic

correspondence of the contracting parties relating to the subject matter and to their own practical construction.

Nielsen v. *Johnson,* 279 U.S. 47;
Arizona v. *California,* 292 U.S. 341;
U. S. v. *Am. Trucking Ass'n, Inc.,* 310 U.S. 534;
Block v. *Compagnie Nationale Air France,* 386 F. 2d 323.

The rule is unquestioned that the validity and construction of a treaty lies within the jurisdiction of the Supreme Court.

B. Altman & Co. v. *U.S.,* 224 U.S. 583.

POINT III

Remedial rights provided by the Public Vessels and Suits in Admiralty Acts have been erroneously denied by the lower court to all nationals by signatory nations to the NATO-Status of Forces Agreement of June 19, 1951.

The law seems well settled that Petitioners were entitled to access to our Federal Courts.

United States District Courts have jurisdiction over admiralty controversies between foreigners, which arise outside the United States. U.S. Const. art. III, § 2; The Belgenland, 114 U.S. 355, 365, 5 S.Ct. 860, 29 L.Ed. 152 (1885); Canada Malting Co. v. Paterson Steamships Ltd., 285 U.S. 413, 420, 52 S.Ct. 413, 76 L.Ed. 837 (1932); Lauritzen v. Larsen, 345 U.S. 571, 575, 589-590, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); see 1 Benedict, Admiralty §§ 82-84 (6th ed. 1940).

POINT IV

Access to our Courts and fair, equitable and national treatment have been denied in violation of the 1954 Treaty of Friendship, Commerce and Navigation (7 UST 1839, TIAS 3593) and in a manner which is repugnant to the American concept of justice that every litigant be afforded his day in court on the merits.

Articles I, IV, VI, XVII, par. 2 of the 1954 Treaty of Friendship, Commerce and Navigation granting Petitioners, German nationals, reciprocal rights of access to our Courts, fair, equitable and national treatment have been totally disregarded by the Lower Court in its decision.

This constituted violations of covenants in a solemn pact and treaty with a friendly sovereign nation and a deprivation of Petitioners' reciprocal constitutional rights, including due process of law vouchsafed to Petitioners by the provisions of said Treaty and by the Constitution of the United States. *Barbier* v. *Connally,* 113 U.S. 27; *Sardino* v. *Federal Reserve Bank of New York,* 361 F. 2d 106.

Conclusion

The Court below erroneously read into the NATO-SOFA Agreement provisions not contained therein by specific wording, intent or by inference affecting the exclusive jurisdiction of our Federal Courts over maritime claims.

The jurisdiction of our Federal Courts to adjudicate claims against the United States predicated on torts committed by United States vessels was not repealed, modified or substituted either directly or by inference in the Agreement.

Nothing contained in any of the NATO-SOFA provisions justifies the conclusion reached by the Court below that the foreign claims commission was clothed with exclusive authority to pass on such claims to the exclusion of our Federal Courts.

The signatories to the Treaty did not have any legal authority to treat with the question of jurisdiction of our Federal Courts, legislation over which is specifically reserved by our Constitution to Congress.

The fact that provisions not contained in the NATO-SOFA Agreement have erroneously been read into the Treaty by the Court below, has created an erroneous and radical concept of law, in direct conflict with the provisions of our Constitution and with international maritime law which calls for correction by this Honorable Court and merits the granting of the petition for a writ of certiorari.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioners

APPENDIX

Judgment of Affirmance of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of October one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

ALFRED M. SHAFTER, as next friend of the dependants and next of kin of JOAQUIN MUNIZ, and for such other persons as may be similarly situated, such as dependants and next of kin of GEORG JOSEPH KOSTKA, GERHART RUDI RICHARD KLATT, DIETER AHRENS, KOCH LOTHAR LUDWIG WILMES and GUNTHER SCHIKULLA and KARL-HEINZ WEINHOLD,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against appellants.

A. DANIEL FUSARO
Clerk

(SEAL)

A true copy,
A. DANIEL FUSARO
Clerk